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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Re: ADVISORY OPINION

HRS NONLAWYER COUNSELOR

CASE NO. 70,615

Objections to Proposed Advisory Opinion
From The Florida Bar Standing Committee
on Unauthorized Practice of Law

INITIAL BRIEF OF THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

B. ELAINE NEW
Assistant General Counsel
Department of HRS
1323 Winewood Blvd.
Tallahassee, FL 32399-0700
(904) 488-2381
Fla. Bar No. 354651

JAMES A. SAWYER, JR.
District VII Counsel
Suite 911
400 W. Robinson
Orlando, FL 32801

COUNSEL FOR THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

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STATEMENT OF THE CASE

The Florida Department of Health and Rehabilitative Services (HRS) sought an opinion from The Florida Bar Standing Committee on Unauthorized Practice of Law on the following question:

> Is the preparation of documents by lay counselors and the presentation of non-contested dependency Court cases by lay counselors, including the filing of documents, presentation of the case, request for relief and testimony of counselors the unauthorized practice of law?

This request was presented to the Unauthorized Practice of Law Committee as a result of an order issued by Judge Gladstone in In the Interest of T.P. and D.C., Case No. 85-16019 FJ 09. (Fla. 11th Cir. Ct.). In an order in that case, Judge Gladstone found that HRS dependency counselors are engaged in the unlawful practice of law. HRS filed an appeal in that case. (Case No. 86-2248, Fla. 3rd DCA). HRS agreed to dismiss the appeal when Judge Gladstone modified the order. Under the modified order, HRS is required to have affidavits of diligent search reviewed by counsel in HRS District 11. As a result of this action, HRS filed this request with The Florida Bar's Unauthorized Practice of Law Committee.

The Committee took testimony and written comments from Judge Gladstone, HRS, State Attorneys and others. The Committee issued its proposed advisory opinion on May 27, 1987. These objections are filed in opposition to that opinion.

The Committee concluded that HRS dependency counselors are authorized to prepare, sign and file detention petitions, affidavits of diligent search and predisposition reports. See App. A at 21.[1] Under the Committee's proposed opinion, HRS would be required to have lawyers prepare or supervise the preparation of all other documents. Additionally, HRS counselors could not appear in Court hearings without a lawyer. This proposed opinion departs significantly from current practice.

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[1] All references are to the Appendix to the Proposed Advisory Opinion.

STATEMENT OF THE FACTS

Since the issue in this proceeding is whether activity by non-lawyer "authorized agents of the department" in the dependency process is or should be the unauthorized practice of law, the "facts" in this proceeding, in addition to the specific activities in dependency cases, are the constitutional, statutory, and decisional law under which this activity takes place.

It has been ongoing practice, accepted by the Department of Health and Rehabilitative Services, the State Attorneys, Juvenile Courts, and others involved, that HRS lay counselors prepare and present in Court noncontested dependency cases before the Juvenile Court. That practice has a long history.

The juvenile courts are specialized descendants of the courts of equity. These courts early assumed and exercised broad parens patriae powers for the protection of orphans and their property, and this power has been expanded by statute to create the present-day juvenile courts. See, Torcia, Wharton's Criminal Procedure, The Juvenile Court, Section 7 (1974). In Florida the Juvenile Court is now a division in the circuit courts, and has exclusive original jurisdiction over actions for "dependency", as that term is defined. See Section 39.01(9), Fla. Stat. (Supp. 1986).

The juvenile courts also have exclusive original jurisdiction over most law violations by minors. This "delinquency" jurisdiction was created by statute in response to

the public perception that children who broke the law should be treated differently than adults; children should receive rehabilitation rather than punishment. The boundaries of delinquency jurisdiction and the degree of emphasis on treatment over punishment, have shifted from time to time as the Legislature has directed.

Prior to 1951 the law regarding juveniles was a morass of general and special acts which will not be analyzed, because in 1951 the Legislature codified this law. Chapter 26880, Laws of Florida (1951), rewrote Chapter 39, Florida Statutes, extensively repealing other general and special laws "...to the end that, except as provided herein specified, the law relating to juvenile courts shall be uniform through the state." Chapter 26880, Laws of Fla. (1951). The purpose of the Legislature in enacting the juvenile courts act was to provide a forum which would consider the problems of dependent children in an informal fashion without the necessity of applying the technicalities that are a part of routine litigation. In re M, 176 So. 2d 600 (Fla. 3rd DCA 1965).

Chapter 39 provided that the juvenile court would employ a counselor and assistant counselors who would perform various services for the court, including investigating reported cases of dependency and delinquency. Ch. 26880, Laws of Fla. (1951). These counselors were specifically authorized to file petitions for dependency and delinquency and they were not required to be lawyers. Ch. 26880, Laws of Fla. (1951).

The first version of HRS was created in 1969 as a collection of largely autonomous Divisions, including the Division of Youth Services and the Division of Family Services. In Chapter 71-130, Section 3, Laws of Florida, authorized agents of the Division of Family Services were given equal authority with the juvenile court counselor to investigate dependency cases, and authorized agents of the Division of Youth Services were given similar authority regarding delinquency.

It is significant that the authority to file these juvenile petitions was given not to the Divisions themselves, nor to HRS, but to "authorized agents" of these divisions. The State Attorney is not mentioned in this 1971 law; no statute requires or permits the State Attorney to prosecute juvenile cases in 1971.

Juvenile courts were implicitly authorized by the 1914 Amendment to Article V, Section 1 (Fla. Const., 1885), which contained a clause granting the Legislature general power to create courts. In 1950, shortly before the 1951 rewrite of Chapter 39, Article V, Section 50 of the 1885 Constitution was adopted, which specifically authorized the Legislature to create juvenile courts. With technical changes only, this section was readopted in 1956, and ultimately became Article V, Section 12 of the Constitution of 1968. The 1956 revision of Article V, also included juvenile courts in the catalogue of authorized courts in Section 1. In the 1972 revision of Article V, effective January 1, 1973, the circuit courts were given juvenile jurisdiction and separate juvenile courts were abolished.

In Article V, Section 20, the Schedule, savings clauses appear in Subsections (b) and (g), providing that existing laws and rules of court (b), and provisions of Article V, Constitution of 1885, as amended, (g), not inconsistent with the revised Article, remain in force until modified.

In 1973 the Legislature extensively rewrote Chapter 39, and for the first time gave a prosecuting attorney for the government a role in juvenile court. The newly created State Attorneys were directed to give legal advice to HRS; Chapter 73-231, Section 10, Laws of Florida; and are given the right to file petitions for delinquency; while the right of the HRS intake officer to file petitions for dependency was specifically preserved. Ch. 73-231, s. 11, Laws of Fla. The State Attorney was directed to represent the state in delinquency proceedings, and also in those dependency proceedings "when a party denies the allegations of the petition and contests the adjudication." Ch. 73-231, s. 11, Laws of Fla. That section also provides that if either proceeding is uncontested, the case may proceed to disposition and the State Attorney need not be present. Most (but not all) State Attorneys interpret these statutes to preclude their further participation in contested dependency cases once the adjudicatory and disposition hearings are concluded.

If a child is found dependent, there will typically be several post-disposition hearings. These will include at a minimum the periodic judicial reviews and, for children in foster care, a review of the performance agreement or plan. These

hearings may be contested or not, and may be simple or involved. HRS is seldom represented by lawyers at these hearings.

Some dependency cases lead to actions for permanent commitment for subsequent adoption. Section 39.41, Fla. Stat. (1985). In these proceedings HRS is represented by counsel, and the parents have a (Florida Constitutional) right to appointed counsel if they are indigent. In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980).

Thus prior to 1973 government-employed social workers were the representative of government in the investigation, preparation and prosecution of all juvenile actions, both dependency and delinquency. In Chapter 73-231, Laws of Florida the responsibility for prosecution of delinquencies and contested dependencies was transferred to the State Attorney. The remaining responsibilities and duties of the social worker (by whatever name) have not been changed or reassigned. These workers, now called "authorized representatives (or agents) of the department" continue to file papers and present them to the juvenile court, under the authority which they have continuously possessed since at least 1951. This Court has never exercised its rule-making power to abolish or alter this practice.

Today dependency cases are brought under Part III of Chapter 39, Florida Statutes (1985 and 1986 Supp.). Under the dependency provisions "authorized agents of the department" routinely prepare, file and present various petition, motions and other papers in juvenile court. An authorized agent of the

department means "a person assigned or designated by the department to perform duties or exercise powers pursuant to this Chapter". Section 39.01(5), Fla. Stat. (Supp. 1986). HRS dependency counselors are authorized agents of the department under Chapter 39. HRS dependency counselors often perform their functions without the assistance of counsel. The appearance of counsel representing HRS in dependency cases is the exception rather than the rule.

In a typical dependency case, HRS receives a report of abuse or neglect pursuant to Section 415.501-.514, Florida Statutes (1985). That report is investigated by an HRS Single Intake worker. The investigation must begin within 24 hours. If the report is indicated the intake worker will take appropriate action. This may include providing the family with voluntarily-accepted services, or removal of the child and subsequent court action.

If a child is removed, the juvenile court must make a probable cause determination within 24 hours. A Detention Petition is filled out by the intake worker on an attorney-prepared form. At the detention hearing (probable cause hearing, first appearance) the court is advised by the intake worker of the investigation to date and the reason for removal. Parents may attend these hearings and often do so; when the child is picked up the parent is advised when the hearing will occur (either that day or the next day). If the child is not returned at the detention hearing, a detention order is issued by the court. The detention petitions and orders are Florida Rules of

Juvenile Procedure Forms 8.904 and 8.906, or local variations of these forms.

If the parents cannot be found, an affidavit of diligent search is executed by the person who did the search, listing the efforts made to locate the parents. Section 39.405(6), Fla. Stat. (1985).

A petition for dependency is prepared, usually by the intake worker, on Florida Rules of Juvenile Procedure Form 8.908. This form is designed so that by inserting only factual information, the petition establishes the court's jurisdiction and the parents or custodian of the child. Section 39.404(1), Florida Statutes (1985), permits agents of HRS to file these petitions, and requires the State Attorney to review them for legal sufficiency.

If the child is picked up, the petition for dependency must be filed within seven days, and the arraignment held within 14 days. Sections 39.402(11), 39.404(3), 39.408(1), Fla. Stat. (1985). If the child has been detained, the adjudicatory hearing (trial) must be held within seven days of the arraignment. Section 39.408(1)(a), Fla. Stat. (1985).

At every hearing the court must review the continued detention of the child, Section 39.402(13), Florida Statutes (1985), and advise the parents of their right to have counsel present. Fla. R. Juv. P. 8.560(a). The court may also consider requests for medical, psychological or drug evaluations on parents or child, and may receive requests from parties or other relatives regarding visitation or change of custody, or for continuances.

In at least one circuit a "waiver and consent" form is available for use. This form, prepared by an attorney, waives representation by counsel and consents to adjudication of dependency. In Dade County, this form may be offered by HRS counselors, who read the document to the parents. Some parents sign it, some do not. If signed, the document is presented to the court by an HRS intake worker at the arraignment or other hearing. The court may inquire into the waiver, and may or may not accept it.

Prior to adjudication, a contested or uncontested case may be resolved by a Plan for Treatment, Training and Conduct. This is essentially a "pretrial diversion" of the family, on conditions tailored for the particular case (supervision, parenting classes, drug programs, psychological counseling, etc.) under conditions expressed in Florida Rules of Juvenile Procedure Form 8.911. The plan itself may be drafted by an HRS intake worker, and presented to the court in lieu of an adjudicatory hearing. Section 39.404(5), Fla. Stat. (1985).

The adjudicatory hearing is the trial of a contested case. At these hearings the petition is prosecuted by the State Attorney. Section 39.404(4), Fla. Stat. (1985).

In both contested and uncontested hearings an adjudication of dependency is followed by a Disposition Hearing. Section 39.408(3), Fla. Stat. (1985). HRS submits a written Pre-Disposition Report (PDR), and in uncontested cases may present and explain this report to the court, without counsel. Section 39.404(5), Fla. Stat. (1985). This PDR includes a recommended disposition of the case, which is not binding on the court.

Following adjudication and disposition, various post-trial hearings may occur. This post-trial phase of the case is usually the longest portion of the case, and often the most important, as this is the phase of the case where rehabilitation of the family is attempted.

If the child is placed in foster care, a performance agreement or plan is prepared in accordance with Section 409.168, Florida Statutes (1985).[2] This document is prepared by an HRS counselor and offered to the parents and other parties. Agreed changes may be made, and the court has the power to resolve any impasse in the negotiations of this agreement. If the parents refuse to participate, or cannot be found, HRS files a unilateral performance plan.

These agreements or plans recite the reason the child is in foster care, and what is to be done, and by whom, to get the child out of foster care. These documents impose performance obligations on the family and the agency, e.g., to provide and to take parenting classes, to obtain employment or housing, to provide assistance in application for public assistance benefits, etc. Sanctions are imposed only by the court, and HRS must recommend return of the children to the parents upon substantial compliance with the agreement. The parents are warned that permanent commitment of the children and subsequent adoption may be sought if the parents do not substantially comply.

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[2] This section has been moved to Chapter 39. See HB 1408, 1987 Session.

The court is required to conduct a judicial review of each foster care case every six months. A petition for review and a social study summary are prepared by the HRS counselor and filed with the court. These hearings review the progress of the case, and can result in the child being sent home, or modification of the performance agreement or plan, or placement of the child with a relative, or the decision to begin permanent commitment proceeding. At the hearing, HRS is seldom represented by counsel. If representation is provided it is not through the State Attorney, but by HRS counsel.

Incidental post-trial motions may be presented at any time, by the HRS counselor or other party. There may be motions to create, modify or enforce visitation rights of parents or others, to change custody from HRS to a relative, to send the child home, to place the child for mental health treatment, or any other matter requiring judicial action. These matters may or may not be contested. They are heard as provided by the Rules of Juvenile Procedure.

Finally, the counselor may file motions to terminate supervision or jurisdiction, (usually without an attorney) or HRS may begin an action for permanent commitment for subsequent adoption (always with an attorney).

Aside from constitutional limitations, dependency is largely a matter of state law. The most significant federal intrusion not of a constitutional nature is Public Law 96-272, the Adoption Assistance and Child Welfare Act of 1980. This Act authorizes federal funding for adoption and child welfare

services which comply with federal requirements in the dependency process. This Act formed the basis for the revisions to Section 409.168, Florida Statutes enacted by Chapter 84-311, Laws of Florida.

The federal law imposes a number of requirements upon states, including periodic judicial review of foster care cases. Federal funds may be withheld from a state which does not comply with the six-month periodic review requirement. See Lynch v. King, 550 F.Supp. 325, 355 (D. Mass. 1982). The federal act requires procedural safeguards but does not require representation by attorneys.

SUMMARY OF ARGUMENT

HRS dependency counselors are not engaged in the unauthorized practice of law. This Court is given the authority to limit practice before juvenile courts to licensed attorneys but it has not done so. The historical role of the juvenile justice system supports the use of nonlawyer HRS counselors in the dependency process.

The functions that HRS dependency counselors perform should not be considered "practicing law". The traditional test for determining whether an activity constitutes the practice of law is not met here. The HRS counselor does not perform functions for another party, but rather acts on behalf of the department. Unlike a corporation the department is not an entity that can appear in court only through counsel.

In addition to the traditional test for determining whether an activity constitutes the practice of law, this Court has considered the fluid nature of the definition of practicing law. The purpose of regulating the practice of law is to protect the public. Having an HRS counselor perform their traditional functions in dependency cases does not harm the public.

If this Court finds that the functions of HRS counselors constitute practicing law, it should find that those functions are authorized.

The Rules of Juvenile Procedure govern practice in dependency proceedings. The Rules provide for "authorized agents of the department", or "persons" or "parties" to prepare, sign and file all documents in dependency proceedings. The Rules

should be read to authorize HRS to perform all these functions through dependency counselors.

The functions of dependency counselors are also authorized under Chapter 39, Florida Statutes. The Legislature is not exceeding its authority by adopting procedures in Chapter 39. When this Court adopted the Rules of Civil Procedure, it adopted special statutory proceedings as rules. Chapter 39 evidences a clear legislative intent to provide a special statutory proceeding for juvenile cases. This Court adopted Chapter 39 as a special statutory proceedings when it adopted the Rules of Civil Procedure. Since Chapter 39 authorizes the functions of the HRS counselor, and it has been adopted as a Rule, the counselors cannot be engaged in the unauthorized practice of law.

Additionally, Article V, Section 20(b) preserves existing provisions of law. The law in juvenile proceedings has authorized these functions by lay persons since at least 1951. The only area where representation is required is in contested adjudicatory hearings. Since the law has not been changed, it is preserved. Therefore, the historical functions of dependency counselors is authorized.

If this Court rejects arguments that HRS dependency counselors are not engaged in the unauthorized practice of law, this Court should by rule authorize these functions. When deciding unauthorized practice of law issues, this Court sits as the judicial system's chief policy maker. The policy of protection of the public, the role of the state, the fiscal

impact upon the state and the negative impact upon the dependency system all support the department's position that the functions of dependency counselors should be authorized.

I. HRS DEPENDENCY COUNSELORS ARE NOT "PRACTICING LAW."

This Court has previously adopted the following guideline to determine what actions constitute the practice of law.

> In determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

State ex rel. The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), Vacated on other grounds, 373 U.S. 379 (1963); on remand, 159 So.2d 229 (Fla. 1963); Florida Bar v. Town, 174 So.2d 395 (Fla. 1965).

The activities of HRS dependency counselors do not constitute the practice of law. The definition of the practice of law requires:

1) Giving of advice and performance of services by one for another.

2) The activities must affect important rights of a person under the law, and

3) The reasonable protection of those rights requires knowledge of the law greater than that possessed by the average citizen.

It is admitted that part three of this definition is met to the extent that HRS dependency counselors possess a knowledge of the law greater than that possessed by the average citizen. By definition, their job requires knowledge of dependency issues which the average citizen does not possess.

The second part of the test requires that the activities affect important rights of a person under the law. It is clear that the dependency process affects important rights of HRS, the child and the parent. However, the term "person" in this part of the test for determining whether an activity constitutes the practice of law implies that the activities must be performed for a separate party. The term "person" should be read to refer to a separate party. The dependency counselor is not giving advice and performing services for a separate party. The dependency counselor does not perform services for the child, the parent or other parties but rather acts as the authorized agent of the department in these cases.

The critical element of this test is the requirement that one must give advice and perform services "for another". HRS dependency counselors are not acting on behalf of another person but are acting on behalf of the agency. No one involved in the process is "represented" by an HRS dependency counselor.

Both the child and the parents are separate parties which are distinct from HRS; they are not represented by HRS. Rule 8.540, Florida Rules of Juvenile Procedure provides that the term "parties" includes the petitioner, the child, and

every person upon whom service of summons is required by law. HRS is almost always the petitioner in a dependency case. According to this rule, the petitioner, i.e. HRS, and the child and the parents are separate parties.

The child is not represented by HRS; the child is represented by the Guardian ad litem. Rule 8.590, Florida Rules of Juvenile Procedures provides that the Guardian ad litem is to represent the child.

The parents clearly are not represented by HRS. The parents are, according to Rule 8.540, Florida Rules of Juvenile Procedure, separate parties since they are entitled to service. The parents are entitled to be represented by separate counsel. In the Interest of D.B. and D.S., 385 So.2d 83, 91 (Fla. 1980).

The HRS dependency counselor is not representing another party, but acts on behalf of HRS and is therefore not performing services "by one for another." It may be argued that HRS is no different than a corporation and as such could not represent itself through a lay dependency counselor. It is well settled that a corporation cannot appear as a party except through counsel. Osborn v. President, Directors and Company of the Bank of the United States, 22 U.S. 738 (1824); Nicholson Supply Co. v. First Federal Savings and Loan, 184 So.2d 438 (Fla. 2nd DCA 1966). However, the rationale for prohibiting a corporation to represent itself does not apply to a state agency. A lay corporate representative is distinct from the corporate entity. As such the entity itself is entitled to representation

by counsel to protect the shareholders, Board of Directors, and the corporate entity. No such factors are relevant to HRS. HRS is a state agency established by Section 20.19, Florida Statutes (1985). In carrying out dependency functions, HRS counselors are acting on behalf of the state.

Nothing prohibits a state agency from appearing pro se.[3] The Legislature has not prohibited this practice. It can be assumed that the Legislature weighed the possible harm by having a lay dependency counselor proceed on behalf of HRS in dependency cases and decided it was in the public interest for dependency counselors to assume this responsibility for the agency. The dependency counselor is not so distinct from the agency itself as to find that the counselor is performing services "by one for another".

In summary, the traditional test for determining whether an activity constitutes the practice of law is not met by functions which are performed by HRS dependency counselors. They possess greater knowledge of the law on dependency issues, but do not act on behalf of another party in these actions. The dependency counselor is part of HRS and only acts on behalf of the agency in these proceedings.

This Court has recognized that the definition of "practicing law" must necessarily change with the everchanging

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[3] However, Section 16.01(5), Florida Statutes (1985), provides that the Attorney General "shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States." This provides general authorization for the Attorney General to represent the state.

business and social order. The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1192 (Fla. 1978). In determining whether an activity constitutes the practice of law, the primary goal should be protection of the public. The Florida Bar v. Brumbaugh, 355 So.2d at 1192. The public is not harmed, nor is HRS harmed by having lay dependency counselors perform their historical functions in dependency cases. Arguably the public interest is protected by the involvement of lay dependency counselors in this process.

The opinion points to several cases where errors were committed by HRS counselors. It is not disputed that there are problems in the dependency process. The opinion suggests, however, that these problems will be remedied by this Court mandating the use of lawyers.[4] The opinion points to the large number of cases handled by dependency counselors, the lack of legal training for these counselors and the high turnover rate in these positions, due in part to low salaries. See App. A at 6. None of these factors will be significantly remedied by lawyers. If lawyers are required, the caseload will become even larger for the attorney who must review documents and appear in Court. The lawyer will, of course, have legal training, but it is highly unlikely they will have any training in the dependency process. Finally, the high turnover rate will likely continue for

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[4] It is interesting to note that in the cases cited in Appendix F-1 and F-2 from Judge Gladstone's court HRS was represented by counsel in those hearings. Either the State Attorney or counsel for HRS was present. The presence of lawyers obviously did not address Judge Gladstone's concerns.

caseworkers and will also apply to the lawyers in this process. They will likely be low paid, high burnout positions.

The assumption that the use of lawyers in the dependency process will improve the system and protect the public is simply not the case.

The primary concern in determining whether an activity is the unauthorized practice of law is the protection of the public. Given this premise, the public is best protected through well trained HRS dependency counselors presenting uncontested cases to the court. This Court should find that the functions of HRS dependency counselors do not meet the definition of "practicing law".

II. EVEN IF COUNSELORS ARE ENGAGED IN THE PRACTICE OF LAW, IT IS NOT THE UNAUTHORIZED PRACTICE OF LAW.

A. The Rules of Juvenile Procedure Govern Practice in Dependency Cases.

1. Introduction

Section 39.40(1), Florida Statutes (1985), provides that all procedures under the dependency part of Chapter 39 are governed by the Rules of Juvenile Procedure unless otherwise provided by law. Thus according to Section 39.40(1), Florida Statutes (1985), the Juvenile Rules control procedure. The Rules of Juvenile Procedure, Rule 8.010, also provide that these rules govern procedures under the Florida Juvenile Justice Act, Chapter 39.

2. The Rules Authorize the Functions of the Dependency Counselor.

The opinion has indicated that the Rules of Juvenile Procedure authorize HRS counselors to do a number of things. See App. A at 19.

- Rule 8.710(a)(5) Rules of Juvenile Procedure, specifies that authorized agents of HRS shall sign detention petitions.

- Rule 8.710(b) Rules of Juvenile Procedure states that authorized agents of HRS are to make a diligent effort to notify the parent or custodian of the child of the detention hearing.

- Rule 8.630(6) Rules of Juvenile Procedure allows authorized agents of the department to certify service of pleadings and orders.

- Rules 8.780(h) and 8.790(a) Rules of Juvenile Procedure imply that HRS counselors prepare and submit predisposition reports to the Court.

The Unauthorized Practice of Law Committee recognized that the Rules of Juvenile Procedure authorized an HRS dependency counselor to perform these functions.

However, the Rules of Juvenile Procedure also authorize HRS dependency counselors to perform other functions. The Rules state that any "person" may file certain documents in Court. For example, Rule 8.720(a)(1) authorizes any person to file a dependency petition; Rule 8.800 authorizes any interested person to file a motion for modification of placement. The rules also authorize any "party" to perform certain functions. For example, any "party" may make a motion, Rule 8.740, and any "party" may submit a proposed plan, Rule 8.760. The committee rejected the department's contention that as a party it is entitled to perform these functions through a lay dependency counselor.

Rule 8.640(b), Florida Rules of Juvenile Procedure implies that HRS need not be represented by counsel. It provides:

> A party who has no attorney but represents himself shall sign his written pleading or other paper and state his address and telephone number, including zip code.

Rule 8.640(b), Fla. R. Juv. P.

Where HRS is the petitioner or where custody of a child has been awarded to HRS, HRS is a "party." Rule 8.540

makes the petitioner a "party". In most cases HRS will be the petitioner. If custody of the child is awarded to HRS, HRS is considered a "party" entitled to notice. DHRS v. J.M.L., 455 So.2d 571 (Fla. 1st DCA 1984).

Thus when Rule 8.540 is read in conjunction with Rule 8.640(b), it is fairly implied that HRS is a party in dependency actions and that as a party HRS is not required to have an attorney. Additionally, since HRS authorized agents are allowed to certify service of pleadings and other documents under Rule 8.630(6), they ought to be considered able to sign the pleading itself. It makes no sense to require an attorney to sign the pleading, but allow an authorized dependency counselor to certify service of the pleading.

Rule 8.800, Rules of Juvenile Procedure provides for "the Department" to file a performance agreement with the Court. Rule 8.800(d), Rules of Juvenile Procedure provides for the filing of a supplemental petition for judicial review by "the Department". This Rule should be read to allow the department to perform these functions through its authorized agents.

The Committee's conclusion regarding performance agreements is confusing. On the one hand the Committee states that

> nothing in this opinion is intended to suggest ... that lawyers should be substantively involved in discussions between HRS and the parent or guardian as to the goals and objectives to be agreed upon in a performance agreement or case plan. This opinion deals only with

> proceedings in Court and documents prepared and submitted to the Court in dependency proceedings.

In the next paragraph the Committee states that all other court documents including performance agreements must be prepared by or under the supervision of a lawyer for HRS. It is impossible for the lawyer to prepare or supervise the preparation of a performance agreement without being involved substantively.

The Committee's conclusion that performance agreements must be prepared by or under the supervision of a lawyer for HRS appears to vary from the approach in its proposed rule amendment to the Rules Regulating the Florida Bar now pending before this Court in Case No. 70,502. In this proposed rule amendment the Committee proposes to allow lay persons to engage in limited oral communications relative to the completion of Bar approved forms.

Although a performance agreement is not a Bar approved form, it is an approved HRS form incorporated into HRS rules. See 10M-6.003(1)(a), Fla. Admin. Code. (See Attachment to App. B). The HRS counselor represents HRS in negotiations over the specific terms of the agreement. The parents may represent themselves, may have an attorney or may have anyone else assist them in preparation of the performance agreement. See Section 409.168, Fla. Stat. (1985). Often times the parents obtain assistance from their minister in the preparation of the performance agreement. The Guardian ad litem is also involved in the preparation of the performance agreement. This Court

authorizes the Guardian ad litem program to utilize lay volunteers to perform that function. Certainly if lay persons can give third parties advice about the completion of Bar forms to be submitted to the court, an HRS counselor can represent the agency in preparation of a performance agreement which will be submitted to the court.

The preparation of a performance agreement is not substantially different than preparation of any contract. Any two people can enter into a contract; it happens all the time without the involvement of lawyers in the negotiation or approval of the contract. Similarly, a performance agreement is a contract negotiated and executed by HRS counselors. This process has not before and should not now be considered the practice of law.

3. Conclusion

Under the Rules, either an authorized agent of the department, a "person" or a "party" may prepare, sign and file all documents in question. The Rules should be read to authorize a HRS dependency counselor to perform these functions.

B. Chapter 39, Florida Statutes, Establishes a Special Statutory Procedure which has been Adopted by this Court to Govern Practice in Dependency Cases.

1. Introduction

The general rule is well settled that the Legislature may not dictate the procedure in the Courts. The Supreme Court is given the power to adopt rules of procedure. The Florida Constitution provides:

> The supreme court shall adopt rules for the practice and procedure in all Courts. . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Art V. Section 2 (a), Fla. Const.

The Legislature may veto or repeal rules, but it cannot amend or supersede a rule. In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973).

The Legislature has not exceeded its authority by adopting the special statutory procedures in Chapter 39. It is clear that parts of Chapter 39 are procedural. That does not, however, defeat the effectiveness of those provisions.

This Court has adopted this special statutory provision as a Rule of Civil Procedure under Rule 1.010. Since the use of dependency counselors is allowed by the statute which has been adopted as a rule, their functions are authorized. Since their functions are authorized they are not engaging in the unauthorized practice of law.

2. Relationship of Juvenile Rules to Civil Rules.

The Juvenile Rules apply in dependency actions and are to be supplemented by the Rules of Civil Procedure. The Rules of Civil Procedure, Rule 1.010, provides that the Civil Rules apply to all actions of a civil nature and all special statutory proceedings in circuit court. The Rules of Civil Procedure are clear that they apply to all civil actions. This includes juvenile dependency actions. The Rules of Juvenile Procedure must be read in conjunction with the Rules of Civil Procedure. Where the Juvenile Rules do not specifically address

an issue, it is appropriate to follow the Rules of Civil Procedure. Fruh v. HRS, 430 So.2d 581 (Fla. 5th DCA 1983); In the Interest of D.B., T.B. and A.B., 383 So.2d 278 (Fla. 5th DCA 1980).

3. Civil Rules Adopt Special Statutory Proceedings.

The Supreme Court has adopted Chapter 39 as a Rule under the provisions of Rule 1.010, Florida Rules of Civil Procedure. It provides:

> These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the probate and guardianship rules or the summary claims procedure rules apply. The form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure.

Rule 1.010, Fla. R. Civ. P.

In adopting this rule, this Court provided in part:

> All rules and statutes in conflict with the following rules are hereby superseded as of their effective date, and any statute not superseded shall remain in effect as a rule promulgated by the Supreme Court.

The Florida Bar, In re Rules of Civil Procedure, 391 So.2d 165, 166 (Fla. 1980).

Therefore, to the extent that there is no conflict with the rules, special statutory proceedings have been adopted as rules.

4. Chapter 39 is a Special Statutory Proceeding.

Chapter 39 dependency proceedings should be considered a special statutory proceeding under Rule 1.010, Florida Rules of Civil Procedure. Chapter 39 dependency proceedings are clearly a statutory creation. The Courts have found that the delinquency part of Chapter 39 is a statutory creation. See In the Interest of S.M.G., 291 So.2d 43 (Fla. 4th DCA 1974), cert. denied, 313 So.2d 761 (Fla. 1975). The dependency section likewise is a unique statutory system designed to protect the best interests of children.

The statute clearly evidences an intent to create a unique statutory provision to protect the interests of children. Section 39.001(2), Florida Statutes (1985) provides in part:

> (2) The purposes of this chapter are:
>
> (b) To assure to all children brought to the attention of the courts.... the care, guidance and control . . which will best serve the emotional, mental, and physical welfare of the child and the best interests of the state.
>
> (c) To preserve and strengthen the child's family ties whenever possible....
>
> (d) To provide procedures by which the provisions of the law are executed and enforced...

(Emphasis added.)

This section shows a legislative intent to create a statutory scheme which is beyond the usual civil action. The scheme provides for the protection of children and the state, and provides for unique procedures for this process. These procedures are an integral part of the statutory scheme. The

social welfare aspects of the system are important to consider. The Department is providing social work services to families in need. The Court's role in these cases is to facilitate the social work process and at the same time ensure that services are not forced upon a family unless the facts justify it. The Legislature has not created a judicial process to enforce legal rights but to protect the best interest of the child. When the case is uncontested the Legislature as part of the social aspects of working with the family to strengthen family ties has chosen to treat these situations in a unique manner. Where the rights of the parties are protected, the social element of these cases is not offensive to due process and promotes other legitimate goals. The use of lay dependency counselors helps promote the social work goals involved in the dependency process; the use of lawyers would hinder those goals. The system is designed to protect children and at the same time to strengthen the family ties. A social work approach best assures these legitimate legislative goals.

The courts have recognized the unique nature of dependency actions. In re the Interest of J.S., 444 So.2d 1148 (Fla. 5th DCA 1984) addressed the nature of dependency proceedings. The court noted that in Florida the circuit judge acting as juvenile judge has succeeded to all of that exceptional common law jurisdiction of courts of chancery. The court is to protect the interest of juveniles. The proper exercise of the unusual jurisdiction in dependency actions imposes a duty to affirmatively act in the interest of a child in a manner which is

different than the usual judicial function of acting only on matters presented by pleadings filed by the parties.

This Court has also explored the unique nature of the dependency action. In In the Interest of D.B. and D.S., 385 So.2d at 90, it was noted that dependency proceedings exist to protect and care for the child. The history of the dependency process shows its unique nature.

Other statutory sections have been found to be Rules under the provision of Rule 1.010, Florida Rules of Civil Procedure. In Gonzalez v. Badcock's Home Furnishings Center, 343 So.2d 7 (Fla. 1977), this section of the Rules of Civil Procedure was addressed. In that case the Appellant had challenged portions of the replevin statute, alleging that the statute dictated court procedure. The Court noted that it had adopted Rule 1.010, which provides that the form, content, procedure and time for pleadings in all statutory special proceedings (such as replevin) is prescribed by the statutes for such proceedings, unless the civil rules specifically provide to the contrary. The rules in question were not specifically contrary to the portions of the statute under attack. Therefore, the statute did not violate the constitution and the procedures established in the statute controlled.

In Berry v. Clement, 346 So.2d 105 (Fla. 2nd DCA 1977) the court interpreted Rule 1.010, Florida Rules of Civil Procedure. There the statute allowed five days for an answer to be filed in a landlord tenant case. The statute did not say how to compute the time period, therefore the method of computing the time under the Rules of Civil Procedure applied.

Similarly, Chapter 39 is a special statutory procedure which has been adopted as a rule by the Supreme Court under the provisions of Rule 1.010, Florida Rules of Civil Procedure. Since this special statutory procedure has been adopted as a rule by the Court, the Legislature is not dictating procedure by the courts.

5. Where there is no conflict with the Rules, Chapter 39 Applies.

Nothing in the Rules or in Chapter 39 require HRS to be represented by counsel excepted in contested cases. Section 39.404(5), Florida Statutes (1985), recognizes that the intake officer may set the case before the Court.

An authorized agent is defined in Section 39.01(5), Florida Statutes (Supp. 1986). It provides:

> (5) "Authorized agent of the department" means a person assigned or designated by the department to perform duties or exercise powers pursuant to this chapter.

HRS dependency counselors by virtue of their job description are authorized agents for purposes of carrying out the provision in Chapter 39. In order to become an intake counselor, an individual must meet the screening requirements of Section 110.1127(3), Florida Statutes (1985). Training will soon be required for all intake counselors through the Juvenile Justice Training Academies. The counselors have knowledge of dependency issues and are authorized by the department to perform intake functions under Chapter 39. The opinion even recognized that HRS lay counselors often have expertise in dependency cases. (App. A. at 20).

The only place that representation is required is if the dependency proceeding is contested. Section 39.404(4), Fla. Stat. (1985). In such cases the state attorney provides representation. In addition, Section 27.02, Florida Statutes (1985), implies that the state does not need to be represented by counsel in certain cases under Chapter 39. It provides that the state attorney will represent the state within his judicial circuit except as provided in Chapters 39 and 959. The intake procedures in Chapter 39 apply in those cases.

The statute allows intake counselors as authorized agents of the department to perform certain functions in the dependency process. This statutory authorization for intake counselors to perform dependency functions is in keeping with the intent of Chapter 39.

6. Since the use of Dependency Counselors is Authorized, They Cannot be Engaged in the Unauthorized Practice of Law.

The statute authorizes lay dependency counselors to perform functions in the dependency process. The statutory authorization is not in conflict with the Rules. Since the use of dependency counselors has been authorized, they are not engaged in the unauthorized practice of law.

7. Conclusion

In conclusion, Chapter 39 is a special statutory provision designed to protect the interests of children. Section 39.40(1), Florida Statutes (1985) provides for the application of the Rules of Juvenile Procedure. Where the Juvenile Rules are

silent, the Rules of Civil Procedure apply. Rule 1.010 Rules of Civil Procedure has adopted the statutory provision in Chapter 39 as rules. Therefore, the Legislature has not exceeded its authority by providing special procedures for dependency actions since the Court has adopted these provisions as rules. Thus, the statutory provisions in Chapter 39 control unless they are specifically in conflict with the Rules of Civil Procedure. The use of dependency counselors, being authorized by statute and rule is not therefore the unauthorized practice of law.

C. The Florida Constitution Article V, Section 20(b) Adopts Preexisting Provisions Until Modified.

Article V, Section 20(b) provides:

> (b) Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article, shall continue in effect until superseded in the manner authorized by the constitution.

When the 1951 changes were made to juvenile law, the Legislature authorized court counselors to perform dependency functions. See Ch. 26880, Laws of Fla. (1951). In 1971, those functions were shared between court counselors and authorized agents of the Division of Family Services. See Ch. 71-130, Laws of Fla. In 1973 the Legislature rewrote the law again. The court counselor functions were all transferred to HRS. See Ch. 73-231, Laws of Fla. The first time that attorneys are brought into the picture is in 1973. The State Attorney is directed to represent the state in dependency proceedings "when a party denies the allegations of the petition and contests the adjudication." Ch. 73-231, s. 11, Laws of Fla.

To date that is the only mention of attorneys on behalf of the state or HRS. Current law continues to provide that the state attorney represent the state "whenever a party denies the allegations of the petition and contests the adjudication." Section 39.404, Fla. Stat. (1985).

The earlier functions performed, at first by Court counselors, and later by HRS dependency counselors have never been modified. Since the Legislature only spoke to representation in contested cases, it can be assumed that the earlier functions of the HRS counselor have never been modified. Article V, Section 20(b) implies that these practices continue in effect until modified.

D. The Current Functions of HRS Dependency Counselors are Authorized.

The Rules of Juvenile Procedure provide for "authorized agents of the department" or "persons" or "parties" to prepare, sign and file all documents in dependency proceedings. The Rules should be read to authorize HRS to perform all of these functions through dependency counselors.

The functions of dependency counselors are also authorized under Chapter 39, Florida Statutes. When this Court adopted the Rules of Civil Procedure, it adopted special statutory proceedings as rules. Chapter 39 is a special statutory proceeding which has been adopted as a rule. Since it authorizes the functions of the HRS counselor, and it is adopted as a Rule, the counselors are performing authorized functions.

Additionally, Article V, Section 20(b) preserves existing provisions of law. Lay persons in the juvenile justice system have been historically authorized. Since this has not changed, the functions of HRS dependency counselors have been preserved.

Since the rules, statute and constitution all authorize or preserve the role of dependency counselors, HRS dependency counselors are not engaged in the unauthorized practice of law.

III. IF HRS COUNSELORS ARE ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW, THIS COURT SHOULD BY RULE AUTHORIZE THEIR ACTIONS.

A. Introduction

If this Court finds that HRS counselors are currently engaged in the unauthorized practice of law, it may remedy the situation by adopting rules which specifically authorize the functions of the counselors. The Supreme Court is given the authority in Article V, Section 2 of the Florida Constitution to adopt rules for the practice and procedure in all courts. Article V, Section 15, gives the Court exclusive jurisdiction to regulate the practice of law. This Court has recognized that implicit in the power to define the practice of law is the ability to authorize the practice by lay representatives. The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980). This Court should adopt by rule any changes needed to allow HRS dependency counselors to continue their current functions in dependency cases.

B. The Court as Policy Maker

In unauthorized practice of law cases this Court acts in its administrative capacity as chief policy maker regulating the administration of the court system. Florida Bar v. Brumbaugh, 355 So.2d 1186, 1189 (Fla. 1978). A number of policy reasons support the position that this Court should authorize the activities of HRS dependency counselors.

1. Public harm

This Court should adopt practices for the court system which will protect the public. The public is not

harmed, nor is HRS harmed by having lay dependency counselors perform their historical functions in dependency cases. The public interest is protected by the involvement of lay dependency counselors in this process.

Generally, lawyers tend to think that injecting their talent into a system will by definition improve that system. That assumption may not apply here. Simply finding that HRS dependency counselors are engaged in the unauthorized practice of law will not ensure that attorneys are provided to represent HRS. The goal of improving the dependency system will not be furthered and may, in fact, be hindered.

HRS, or the state, is currently represented by the State Attorney in contested actions. Even in contested actions, HRS dependency counselors file the petitions, may seek continuances, and so forth. If the State Attorney is mandated to provide representation only for contested cases through the adjudicatory hearing, HRS must be provided the resources for counsel for all other stages. This includes the initial proceedings in all cases, representation in non-contested cases, and representation following the adjudicatory hearing in all cases.

The resources for adequate representation in all these stages may never be supplied by the Legislature. It is not uncommon for the courts or the Legislature to mandate performance of a duty by HRS, but then never provide the agency sufficient funding to carry out that duty. For example, in In the Interest of R.W., 409 So.2d 1069 (Fla. 2nd DCA 1981), the court found that

the Guardian ad litem fee must be paid by HRS. This was also true in In re Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984), rev. denied, 472 So.2d 732 (Fla. 1985), Dept. of Health and Rehab. Services v. A.H., 459 So.2d 417 (Fla. 1st DCA 1984), and Dept. of Health and Rehab. Services v. Metropolitan Dade County, 459 So.2d 1182 (Fla. 3d DCA 1984). But the Legislature has never provided an appropriation for that expenditure. When such fees are paid, it is paid at the expense of other programs.

If the activities performed by dependency counselors are found to be the unauthorized practice of law, funds for attorneys to perform those functions may not be forthcoming. Our estimate is that the fiscal impact could be over six million dollars. See App. I.

If these functions were not adequately funded one could expect less than adequate representation in the cases that are presented and the potential for dependency cases not to proceed because of insufficient attorneys to handle the cases. Since the Legislature has seen fit to authorize agents of the department to handle aspects of noncontested dependency cases, the system and those involved in the process may be better served by adequately trained dependency counselors than by nonexistent lawyers.

The Committee's suggestion that pro bono attorneys be used to represent HRS is unrealistic. Pro bono attorneys are often unavailable for the poor civil litigant. HRS, a large state bureaucracy, is not likely to attract lawyers willing to provide services free of charge.

There is no evidence that the use of lawyers will protect the public more than dependency counselors do in noncontested hearings. The public interest in advancing social welfare goals through the dependency process will be thwarted if the system becomes totally adversarial. The public interest supports a nonadversarial dependency system.

The primary concern in determining whether an activity is the unauthorized practice of law is the protection of the public. Given this premise, the public is best protected through well trained HRS dependency counselors presenting uncontested cases to the court. Lawyers are not needed, the public will not have any greater protection and the public interest will not be served through the unnecessary expense of a massive hiring of lawyers for the State.

2. Other States

Other states have addressed this issue. For example, in Missouri, juvenile officers in the court perform functions similar to HRS dependency counselors. See Mo. Ann. Stat. Sections 211.351, 211.361, 211.455 and 211.459.

Similar issues have been addressed by other state courts. In State v. Aberizk, 345 A.2d 407 (N.H. 1975), the New Hampshire Supreme Court faced a similar issue when objection was raised to a police officer prosecuting minor criminal cases. The court considered the historical role of police officers in minor criminal cases, time constraints and budgetary requirements. In that case, the court found no constitutional violations and deferred the issue to the Legislature. In South Carolina, the

court addressed this issue in State ex rel. McLeod v. Seaborn, 244 S.E. 2d 317 (S.C. 1978). The court was asked to determine the propriety of the practice of the South Carolina Highway Patrol assigning supervisory officers to assist arresting officers in the prosecution of misdemeanor traffic violations in their magistrates' court. The court held:

> When the officers of the Highway Patrol present misdemeanor traffic violations in the magistrates' courts, . . . they do so in the official capacities as law enforcement officers and employees of the State. These officers do not hold themselves out to the public as attorneys, and their activity in the magistrates' courts does not jeopardize the public by placing "incompetent and unlearned individuals in the practices of law." To the contrary, this activity renders an important service to the public by promoting the prompt and efficient administration of justice.

(citations omitted).

All of the factors considered by the South Carolina court in this case support the department's position here. The HRS counselors perform functions in their official capacities as authorized agents of the department, they do not hold themselves out to the public as lawyers, they do not jeopardize the public, but render an important service to the public.

3. Fiscal Impact

If this Court adopts the proposed advisory opinion, the requirement to have lawyers review all documents and appear in court in uncontested cases will have a significant fiscal impact upon the State of Florida. The Department prepared a rough fiscal impact analysis which was submitted to the Standing Committee. (See App. I). Our original estimate was that the use of attorneys in the dependency process would cost the

state over six million dollars. This fiscal impact was prepared without actual experience in the area upon which to base projections. It is likely that the amount of time for an uncontested case may very well exceed three hours. The attorney would be required to review the dependency petition, waiver of counsel stipulations, motions, plans of proposed treatment, and performance agreements,[5] and would be required to be present in court for the presentation of the noncontested case. This will at a minimum take three hours of attorney time. In addition, there were 90,768 judicial reviews last year. This fiscal impact failed to consider attorney time for judicial reviews. It is clear that the original fiscal impact projection is low.[6]

The Court must consider where this money will come from. Section 216.292, Florida Statutes (1985), provides that funds provided in the General Appropriations Act can be expended only for the purpose for which it was appropriated. That section also provides two exceptions to this general rule. If a transfer is less than five percent of the original approved budget, an agency head may authorize the transfer. If the transfer exceeds this amount, it must be approved by the Administration Commission. However, a transfer of existing appropriations is the only mechanism available to obtain funding for legal services

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[5] Permanent commitment petitions and proceedings are already handled by counsel for HRS.

[6] This Fiscal Impact does not address any additional court expenditures which would be incurred as a result of a more adversarial system.

during the fiscal year. Existing social service programs will be curtailed if the Court adopts the proposed advisory opinion. Monies will be taken from funds appropriated to provide services to clients to enable the department to hire lawyers. Even if the Court waits until July 1, 1988, to issue its mandate, the Legislature during the appropriations process will likely look to existing social service program budgets to fund new lawyer positions. This Court can take judicial notice of the fact that social service spending in Florida is one of the lowest in the Country. Taking money from existing social service programs to fund lawyers will work a grave injustice.

This Court should take this opportunity to exercise its policy making functions for the judicial system and adopt rules to specifically authorize the functions of HRS dependency counselors.

C. Adoption of Rules

Where the Legislature has enacted procedures into law, this Court has, in the past, adopted those procedures into rule. In In re Clarification of Florida Rules of Practice and Procedures, 281 So.2d 204 (Fla. 1973), this Court adopted several changes to the Rules of Practice and Procedure where the Legislature had attempted to dictate procedure. Similarly in In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979), the Court temporarily adopted the newly enacted evidence code as rules.

The following changes are proposed to the Rules of Juvenile Procedure to specifically authorize the HRS dependency counselor to perform their historical functions in noncontested dependency cases.

> Rule 8.570. Providing Counsel to Petitioners. At any stage in a dependency proceeding, an authorized agent of the department or other petitioner may represent the department or other petitioner in noncontested dependency actions.

D. Delayed Implementation

If this Court finds that HRS dependency counselors are engaged in the unauthorized practice of law, and it declines to authorize those actions by Rule, this Court should delay the issuance of mandate to allow the department, state attorneys, and others involved in dependency to obtain the necessary legal services to continue the dependency system. If the Court does not authorize the use of dependency counselors in these cases, the dependency process will come to a screeching halt. HRS simply does not have the resources to hire attorneys to provide representation in thousands of dependency actions. If on the day after this Court's decision is rendered, HRS is required to appear only through counsel and have petitions and forms reviewed by counsel as the proposed opinion suggests, the children who the system is designed to protect will be harmed. Parents will not stop abusing and neglecting their children. HRS will still be required to file a dependency petition within seven days of taking the child into custody. When the agency is unable to obtain legal services, these functions will not be performed and children will remain in abusive home situations.

E. Standards for Representation

If the public policy purpose of requiring HRS to appear by counsel is to improve the dependency system, less harsh alternatives are available to this Court.

This Court could by rule establish the criteria by which to determine whether an HRS lay counselor is "qualified". The Court in The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980), required lay representatives to be qualified to appear before the Division of Administrative Hearings. Similar criteria for the qualification of lay dependency counselors could be established through the Rules.

In 1986 the Florida Legislature mandated training for HRS dependency personnel through the Juvenile Justice Training Academies. Section 402.40, Fla. Stat. (Supp. 1986). Those programs are in the formative stages. They will, however, be providing five weeks of training including more extensive training on the judicial process. When the programs are fully established this Court could require as a condition of an HRS counselor appearing in court the requirement that the training academy course be completed. Because of the formative stages of these academies, (the first one is scheduled to be in September, 1987), such a rule would need to be prospective in nature with a delayed implementation date.

Alternatively, if HRS is required to appear by counsel in uncontested dependency proceedings with the express purpose of improving the dependency process, this Court should take affirmative steps to ensure that the use of lawyers will improve the system. This goal could be assisted by the Court adopting caseload standards for attorneys who handle uncontested dependency cases. This has been done for public defenders through the American Bar Association's Standards for Criminal

Justice. See I ABA Standards for Criminal Justice, Standard 5-4.3 (2nd ed. 1980), and commentary. Without some standards, the stated goal of improving the dependency process will not be met.

CONCLUSION

The historical role of the juvenile justice system has been nonadversarial. As part of that nonadversarial system, the Legislature and courts have long approved of HRS dependency counselors filing documents in all dependency cases and appearing in court in noncontested cases. The proposed advisory opinion ignores the historical role of the juvenile court and the public policy reasons behind it. This Court should disapprove the proposed advisory opinion and should find that HRS dependency counselors are engaged in an important public function and not the unauthorized practice of law.

Respectfully submitted this 22nd day of June, 1987.

B. ELAINE NEW
Assistant General Counsel
Department of HRS
1323 Winewood Blvd.
Tallahassee, FL 32399-0700
(904) 488-2381
Fla. Bar No. 354651

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF DHRS has been sent by U. S. Mail this 22nd day of June, 1987 to:

Robert M. Sondak
Paul, Landy, Beiley & Harper, P.A.
Penthouse, Atico Financial Center
200 S.E. First Street
Miami, Florida 33131

Mary Ellen Bateman
Unauthorized Practice of Law Attorney
The Florida Bar
Tallahassee, Florida 32301

B. Elaine New

B. ELAINE NEW
Assistant General Counsel
Department of HRS
1323 Winewood Blvd.
Tallahassee, FL 32399-0700
(904) 488-2381
Fla. Bar No. 354651